



March 4, 2019

Robert M. Knop  
Assistant General Counsel  
1050 First Street NE  
Washington, DC 20463  
*Submitted electronically to [www.fec.gov/fosers](http://www.fec.gov/fosers)*

**Re:       Comments on Notice 2018-15: Rulemaking Petition: Advisory  
          Opinion Procedures**

Dear Mr. Knop,

Campaign Legal Center (“CLC”) respectfully submits these comments in response to Notice 2018-15, regarding the Commission’s notice of availability on advisory opinion procedures, 83 Fed. Reg. 62283 (Dec. 3, 2018).

Federal Election Commission (“FEC”) advisory opinions often have the effect of signaling the Commission’s interpretation of laws or court decisions to broad categories of individuals and entities. Yet the agency is increasingly issuing its advisory opinions through an opaque process that deprives the public, and

sometimes even the requestors, of any meaningful opportunity to consider or comment on a proposed draft opinion before Commissioners vote to approve a final advisory opinion. As a nonpartisan, nonprofit organization dedicated to promoting and defending effective campaign finance rules, CLC has a strong institutional interest in FEC advisory opinion procedures that are transparent and that allow for submission and consideration of public comments before a final advisory opinion is issued. Therefore, CLC supports a rulemaking to bring more transparency to the Commission's advisory opinion process and to ensure the public has a meaningful opportunity to weigh in on advisory opinion drafts before the Commission meets and votes to approve a final opinion.

The Federal Election Campaign Act ("FECA") proscribes procedures for the Commission to issue advisory opinions in response to written requests concerning the application of federal campaign finance law to a specific transaction or activity. 52 U.S.C. § 30108(a)(1). FECA provides that Commission advisory opinions may be relied upon by any person involved in the specific transaction or activity described in the underlying advisory opinion request, as well as any person involved in specific transactions or activities that are "indistinguishable in all material aspects" from those proposed in the underlying request. *Id.* § 30108(c)(1).

While these provisions, on their face, narrowly circumscribe the reach of any particular FEC advisory opinion, Commission advisory opinions, in practice, often provide general answers to unresolved legal questions in a manner that affects broad categories of individuals and entities. Indeed, modern super PACs are

essentially the result of two FEC advisory opinions.<sup>1</sup> The Commission has also, through advisory opinions:

- explained that rules governing contributions by spouses apply to legally married same-sex couples, *see* Advisory Opinion 2013-06 (DSCC); Advisory Opinion 2013-07 (Winslow-II);
- permitted current members of Congress to use campaign funds to pay for installing, upgrading, and monitoring security systems at members' residences, *see* Advisory Opinion 2017-07 (Sergeant at Arms);
- provided guidance on disclaimer requirements for paid digital electoral advocacy, *see* Advisory Opinion 2017-12 (Take Back Action Fund); Advisory Opinion 2002-09 (Target Wireless);
- explained that a non-incumbent federal candidate may lawfully use campaign funds to pay for childcare expenses incurred as a direct result of the candidate's campaign activity, *i.e.*, that such use of campaign funds is not a prohibited personal use, *see* Advisory Opinion 2018-06 (Liuba for Congress);

and

- authorized a for-profit corporation to provide free cybersecurity services to "election-sensitive" customers, including federal candidates and national party committees, concluding that providing such services to those customers, at least on a nonpartisan basis, "would not result in the making of a prohibited in-kind contribution," *see* Advisory Opinion 2018-11 (Microsoft Corporation).

Under the Commission's current procedures, adopted in 2009, members of the public are supposed to have "two distinct opportunities to participate in the advisory opinion process": first, an opportunity to "submit written comments on the

---

<sup>1</sup> *See* Advisory Opinion 2010-09 (Club for Growth); Advisory Opinion 2010-11 (Commonsense Ten); *see also* Dan Eggen & T.W. Farnam, *New 'Super Pacs' Bring Millions Into Campaigns*, WASH. POST (Sept. 28, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092706500.html> ("The super PAC model emerged with little fanfare this summer from a pair of FEC advisory opinions . . . . The FEC said the super PACs were allowed because of the *Citizens United* decision and a subsequent appeals court ruling, which struck down limits on individual contributions to independent groups.").

advisory opinion request” itself, and second, an opportunity to “submit written comments on a draft advisory opinion” made available to the public before the Commission meeting at which the advisory opinion request is considered. 74 Fed. Reg. 32160, 32160 (July 7, 2009). In addition, the Commission’s 2009 guidance explained that it was seeking to improve the transparency and timeliness of its advisory opinion procedures, as well as the opportunities for comment, by self-imposing a requirement, for all advisory opinion requests subject to the ordinary 60-day statutory deadline, to “provide at least one draft response to the Requestor and the public no later than one week prior to the Commission open meeting at which the advisory opinion [request] will be considered.” *Id.* at 32161. The Commission explained that providing a draft at least a week before it considers an advisory opinion request “provide[s] the public [a] meaningful opportunity to submit comments on the draft and for the Commission to properly consider any such comments.” *Id.* Conversely, when the Commission fails to make a draft advisory opinion public within that timeframe, it both thwarts the public’s ability to consider and comment on the draft and deprives Commissioners of important feedback regarding the potential consequences of the draft opinion, as Commissioners themselves have lamented.<sup>2</sup>

---

<sup>2</sup> See, e.g., Statement of Commissioner Steven T. Walther Re: Advisory Opinion 2010-09 (Club for Growth) and Advisory Opinion 2010-11 (Commonsense Ten), at 2, July 22, 2010, <https://www.fec.gov/files/legal/aos/2010-09/1144645.pdf> (“Although the Commission received very helpful comments on the drafts of these Advisory Opinions, unfortunately, commenters were afforded less than 24-hours to review the drafts and submit their comments. It is likely that the Commission may have received significantly more comments if additional time was provided.”).

Over the past few years, it has become routine for the Commission to issue multiple, competing drafts of an advisory opinion, including one or more drafts released within just days or even hours of the meeting at which the underlying request is considered. Indeed, between 2015 and 2018, CLC estimates that there were at least 32 instances where the Commission issued one or more drafts of an advisory opinion *within 48 hours* of the meeting at which the drafts were voted on.<sup>3</sup>

---

<sup>3</sup> In 2018, the FEC voted on final advisory opinions within 2 days or less of the public release of a draft opinion in the following matters: Advisory Opinion 2018-07 (Mace) (decided one day after public release of Draft B); 2018-05 (CaringCent, LLC) (decided one day after public release of Draft A); 2018-04 (Conservative Primary LLC) (vote taken one day after public release of Draft B, and two days after public release of Draft A); 2018-03 (Committee to Elect Michael Gilmore) (decided one day after public release of Draft B, and two days after public release of Draft A).

In 2017, the FEC voted on final advisory opinions within 2 days or less of the public release of a draft opinion in the following matters: Advisory Opinion 2017-12 (Take Back Action Fund) (released Draft C 35 minutes *after* scheduled *start* of Commission meeting where the matter was discussed and voted on); Advisory Opinion 2017-10 (Citizens Against Plutocracy) (decided one day after public release of Draft B); Advisory Opinion 2017-08 (Point Bridge Capital) (decided two days after public release of Draft A); Advisory Opinion 2017-07 (Sergeant at Arms) (decided one day after public release of Draft C); Advisory Opinion 2017-05 (Great America PAC and Committee to Defend the President) (decided two days after public release of Draft C); Advisory Opinion 2017-03 American Association of Clinical Urologists and UROPAC) (decided one day after public release of Draft B); Advisory Opinion 2017-01 (American Urological Association) (decided one day after public release of Draft B).

In 2016, the FEC voted on final advisory opinions within 2 days or less of the public release of a draft opinion in the following matters: Advisory Opinion 2016-15 (Gary Johnson victory Fund) (decided within hours of public release of Draft B); Advisory Opinion 2016-14 (11 Libertarian State Committees) (decided one day after public release of Draft B); Advisory Opinion 2016-13 (Martins for Congress II) (decided within hours of public release of Draft B); Advisory Opinion 2016-12 (Citizen Super PAC) (decided one day after public release of Draft C); Advisory Opinion 2016-10 (Parker) (decided within hours of public release of Draft B); Advisory Opinion 2016-08 (eBundler.com) (decided one day after public release of Draft B); Advisory Opinion 2016-06 (Internet Association PAC) (first vote taken one day after public release of Draft B; second vote taken within hours of public release of Draft C); Advisory Opinion 2016-03 (Holding for Congress) (released Draft C 34 minutes *after* scheduled start of Commission meeting where the matter was discussed and voted on); Advisory Opinion 2016-02 (Enable) (decided one day after public release of Draft B).

In 2015, the FEC voted on final advisory opinions within 2 days or less of the public release of a draft opinion in the following matters: Advisory Opinion 2015-15 (WeSupportThat.com) (decided one day after public release of Draft A); Advisory Opinion 2015-14 (Hillary for America II) (decided within hours of public release of Drafts D and E; released Draft E nearly one hour *after* scheduled start of Commission meeting where the matter was discussed and voted on); Advisory Opinion 2015-11 (FYP) (vote taken one day after public release of Draft B); Advisory Opinion 2015-10 (21st Century Fox) (decided one day after public release of Draft A); Advisory Opinion 2015-09 (Senate

In a third of those instances, drafts were issued on the same day — *sometimes within mere minutes* — of the Commission’s vote.<sup>4</sup> And in one instance last year, CLC had to submit a request under the Freedom of Information Act to obtain the release of the draft advisory opinion that Commissioners discussed and voted to approve.<sup>5</sup> CLC did not receive the draft until nearly a full month *after* the Commission voted on it.<sup>6</sup>

---

Majority PAC and House Majority PAC) (decided one day after public release of Draft F); Advisory Opinion 2015-08 (Repledge) (first vote taken within hours of public release of Drafts C and D; second vote taken within hours of public release of Draft E); Advisory Opinion 2015-07 (Hillary for America) (decided one day after public release of Draft A); Advisory Opinion 2015-06 (Waters) (released Draft D three minutes *after* scheduled start of Commission meeting where the matter was discussed and voted on); Advisory Opinion 2015-03 (Democracy Rules) (released Draft D one minute before scheduled start of Commission meeting where the matter was discussed and voted on); Advisory Opinion 2015-02 (Grand Trunk Western Railroad – Illinois Central Railroad PAC) (decided two days after public release of Draft A).

<sup>4</sup> See Advisory Opinion 2017-12 (Take Back Action Fund) (released Draft C 35 minutes after scheduled start of Commission meeting where the matter was discussed and voted on); Advisory Opinion 2016-15 (Gary Johnson Victory Fund) (decided within hours of public release of Draft B); Advisory Opinion 2016-13 (Martins for Congress II) (decided within hours of public release of Draft B); Advisory Opinion 2016-10 (decided within hours of public release of Draft B); Advisory Opinion 2016-06 (Internet Association PAC) (first vote taken one day after public release of Draft B; second vote taken within hours of public release of Draft C); Advisory Opinion 2016-03 (Holding for Congress) (released Draft C 34 minutes *after* scheduled start of Commission meeting where the matter was discussed and voted on); Advisory Opinion 2015-14 (Hillary for America II) (decided within hours of public release of Drafts D and E; released Draft E nearly one hour *after* scheduled start of Commission meeting where the matter was discussed and voted on); Advisory Opinion 2015-08 (Repledge) (first vote taken within hours of public release of Drafts C and D; second vote taken within hours of public release of Draft E); Advisory Opinion 2015-06 (Waters) (released Draft D three minutes *after* scheduled start of Commission meeting where the matter was discussed and voted on); Advisory Opinion 2015-03 (Democracy Rules) (released Draft D one minute before scheduled start of Commission meeting where the matter was discussed and voted on).

<sup>5</sup> See Letter to Federal Election Commission FOIA Requester Service Center, from Maggie Christ, Researcher/Investigator, Campaign Legal Center, Sept. 26, 2017 (requesting copies of drafts of Advisory Opinion 2017-06 (Stein/Gottlieb) other than the publicly available Drafts A and B), *available at* [https://campaignlegal.org/sites/default/files/9\\_26\\_17%20FEC\\_FOIA%20Request.pdf](https://campaignlegal.org/sites/default/files/9_26_17%20FEC_FOIA%20Request.pdf); *see also* Minutes of an Open Meeting of the Federal Election Commission, Sept. 14, 2017 (referencing a motion to approve a non-public draft “circulated by Commissioner Weintraub’s office on September 14, 2017 at 12:13p.m.”), [https://www.fec.gov/resources/cms-content/documents/September\\_14\\_2017\\_Open\\_Meeting.pdf](https://www.fec.gov/resources/cms-content/documents/September_14_2017_Open_Meeting.pdf).

<sup>6</sup> See FEC: Response to FOIA, Oct. 11, 2017, <https://campaignlegal.org/document/fec-response-foia>.

These practices are contrary to the Commission’s stated goals of transparency, timeliness, and providing meaningful opportunities for public feedback. And they increase the risk that an FEC advisory opinion will open the door to activities not fully contemplated by the Commission.<sup>7</sup> Providing adequate time for submission and consideration of public comments on a draft advisory opinion increases the likelihood that a final advisory opinion will avoid or at least minimize those unintended consequences.<sup>8</sup>

The Commission should proceed with a rulemaking that will require greater transparency in the Commission’s advisory opinion process and to ensure an opportunity for meaningful public feedback regarding draft advisory opinions.

---

<sup>7</sup> See, e.g., Comments of Campaign Legal Center on Advisory Opinion 2017-06 (Stein and Gottlieb) Drafts A and B (Aug. 23, 2017) (urging the Commission not to approve a proposal that would allow corporations to solicit and transmit contributions from the general public to the corporations’ favored candidates); Zachary Roth, *Trump’s Top Lawyer Helped Open Political Spending floodgates*, MSNBC (Mar. 23, 2016), <http://www.msnbc.com/msnbc/trumps-top-lawyer-helped-open-political-spending-floodgates>, (citing former FEC general counsel Lawrence Noble, who explained that “the rise of super PACs, which has allowed the uber-wealthy to pour unlimited dollars into electoral politics, wasn’t inevitable after the Supreme Court’s 2010 *Citizens United* ruling. It happened thanks in part to the FEC’s decision . . . to interpret *Citizens United* broadly rather than seeking to salvage what it could of campaign finance law”).

<sup>8</sup> See, e.g., Certification, Advisory Opinion 2018-11 (Microsoft), Sept. 7, 2018 (certifying Commission vote to Approve draft A subject to certain changes, including addition of a reference to the Commission’s authority to implement the ban on foreign participation in elections at 52 U.S.C. § 30121, which had been urged in comments to draft A submitted by Campaign Legal Center); Advisory Opinion 2017-07 (Sergeant at Arms) (reflecting modifications to draft A of the advisory opinion as had been urged in comments submitted by Campaign Legal Center regarding problems with that draft’s reframing of the request to ask about residential security systems not “primarily intended” to increase home value).

CLC thanks the Commission for the opportunity to submit these comments.  
If the Commission decides to hold a hearing on this matter, CLC respectfully  
requests an opportunity to testify at that hearing.

Sincerely,

*/s/*

Brendan Fischer  
Director, Federal Reform